

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

LABOR SOLUTIONS, INC.

v.

COMMISSIONER OF REVENUE

Docket No. C322587

Promulgated:
March 29, 2018

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39, from the refusal of the Commissioner of Revenue ("Commissioner" or "appellee") to abate withholding tax and additions thereto for the periods commencing January 1, 2004 and ending December 31, 2008 ("periods at issue") assessed against Labor Solutions, Inc. ("appellant").

Chairman Hammond heard this appeal. Commissioners Scharaffa, Rose, Chmielinski and Good joined him in the decision for the appellee.

These findings of fact and report are issued pursuant to a request by the appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.

Kim Woongtae, Esq. for the appellant.

Marikae Toye, Esq. and *Keri Angus, Esq.* for the appellee.

FINDINGS OF FACT AND REPORT

Based on the testimony and exhibits entered into evidence at the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

The appellant was a domestic corporation owned and operated by Tam Vuong ("Mr. Vuong"). The appellant's sole business was the provision of temporary workers to several light manufacturing facilities in and around Worcester County.

During April of 2008, the Massachusetts Attorney General ("AG") initiated an investigation of the appellant and Mr. Vuong. Following the investigation and an indictment, Mr. Vuong and the appellant pled guilty to more than sixty counts of violating various wage laws as well as the commission of insurance and tax fraud. The crimes included: Willful Failure to Pay Minimum Wage; Willful Failure to Pay Overtime; Willful Charging a Transportation Fee that Reduces an Employee's Daily Wages Below the Minimum Wage; Willful Failure to Provide a Paystub; Willful Failure to Furnish Employment Records to the Attorney General; Workers' Compensation Insurance Fraud; Unemployment Insurance Fraud; Failure to Make Unemployment Insurance Contributions; Larceny by False Pretenses; Willful Failure to File a Tax Return; and Willful Aiding or Assisting in the Presentation of Fraudulent Tax Documents.

As part of its investigation, the AG discovered that the appellant had paid at least \$11 million in cash wages,¹ which it failed to disclose to its workers' compensation carrier or to the Massachusetts Department of Revenue ("DOR").² Aware of the AG's conclusions, and having participated in the Joint Enforcement Task Force on the Underground Economy and Employee Misclassification, the DOR's Audit Division initiated an audit of the appellant and on November 13, 2010, issued a Notice of Assessment ("NOA") for the periods at issue. The NOA represented additional withholding tax associated with the unreported \$11 million of cash wages as well as interest and penalties. The NOA was issued pursuant to G.L. c. 62C, § 26(d), which permits the Commissioner to make an immediate assessment in the case of "a false or fraudulent return filed with intent to evade a tax or of a failure to file a return."

To calculate the assessment, the Commissioner divided the cash wages of \$11 million evenly over the periods at issue and multiplied these sums by 5.3%, the applicable tax rate, to arrive at a total withholding tax deficiency of \$583,000.00. Having concluded that the appellant filed false or fraudulent Withholding Tax Returns, the Commissioner imposed additions to

¹ The AG later determined that the undisclosed cash payments substantially exceeded \$11 million. The Commissioner chose to base his assessment on the lower sum.

² Though the appellant had timely filed Withholding Tax Returns for the periods at issue, the returns did not incorporate these cash wages.

tax pursuant to G.L. c. 62C, § 28, which doubled the withholding amount. After the addition of interest, the assessment amounted to \$1,565,957.00.

On December 13, 2011, the appellant timely filed a Massachusetts Form CA-6, Application for Abatement/Amended Return, on which the appellant requested a hearing with the DOR's Office of Appeals. The hearing was held on September 6, 2012, and on February 18, 2014, having received no documentation supporting the propriety of not reporting the cash wages, the Office of Appeals notified the appellant of its conclusion that the assessment was proper. By Notice of Abatement Determination dated February 25, 2014, the Commissioner denied the appellant's abatement application and the appellant timely filed its Petition with the Board on April 28, 2014.³ Based on this chronology, the Board found that it had jurisdiction to hear and decide this appeal.

Mr. Vuong acknowledged that he paid many of his workers in cash. His sole stated reason for paying a worker in cash or by check was the preference of the worker. Further, the workers who were paid in cash were not issued Forms 1099 or Forms W-2 by the appellant. Mr. Vuong claimed that he did not retain withholding

³ When the last day of a filing period falls on a Saturday, Sunday, or legal holiday, the filing is still considered timely if it is made on the following business day. See G.L. c. 4, § 9. Accordingly, the Board found and ruled that the appellant timely filed its Petition on Monday, April 28, 2014.

tax from the workers he paid in cash. Given Mr. Vuong's acknowledged fraudulent and criminal acts relating to the operation of the appellant and the dearth of documentation relating to the cash portion of the appellant's business, the Board found that Mr. Vuong's claim regarding retention of withholding tax was not credible.

Workers paid by check, who comprised a minority of the appellant's business, were issued Forms W-2 as employees, and their wages and tax withholding were reported on the appellant's Withholding Tax Returns, which as previously noted were timely filed with the DOR for each of the periods at issue. Consistent with this practice and Mr. Vuong's testimony during the hearing of this appeal, the Board found that Mr. Vuong understood the appellant's obligation to withhold tax and file withholding returns.

Based on the foregoing, and for the reasons explained in the following Opinion, the Board found and ruled that the appellant filed false or fraudulent Withholding Tax Returns with the intent to evade a tax throughout the periods at issue. Thus, the Board found and ruled that the disputed assessment was proper. Accordingly, the Board issued a decision for the appellee in this appeal.

OPINION

Pursuant to G.L. c. 62B, § 2 ("§ 2"), employers must deduct and withhold taxes on wages. Section 2 provides, in pertinent part:

Every employer making payment to employees on or after February fifteenth, nineteen hundred and fifty-nine, of wages subject to tax under chapter sixty-two shall deduct and withhold a tax upon such wages in accordance with tables prepared by the commissioner which tax so withheld shall be substantially equivalent to the tax imposed by said chapter sixty-two.

Under certain circumstances, employers that fail to comply with § 2 and attendant filing obligations may, for an indefinite period, be subject to immediate assessment. In particular, G.L. c. 62C, § 26(d) provides:

In the case of a false or fraudulent return filed with intent to evade a tax or of a failure to file a return, the commissioner may make an assessment at any time, without giving notice of his intention to assess, determining the tax due according to his best information and belief.

Moreover, the Commissioner may invoke G.L. c. 62C, § 28 which states, in pertinent part:

[I]f a person has filed a false or fraudulent return or has filed a return with a willful attempt in any manner to defeat or evade the tax, the commissioner may determine the tax due, according to his best information and belief, and may assess the same at not more than double the amount so determined, which additional tax shall be in addition to the other penalties provided by this chapter.

This appeal presents two questions: whether the appellant failed to comply with its obligations under § 2; and whether any such failure warranted issuance of an assessment pursuant to G.L. c. 62C, § 26(d) and imposition of additions to tax under G.L. c. 62C, § 28. The appellant made little effort to argue that its obligations under § 2 had been met for any of the periods at issue. Rather, the appellant focused primarily on the application of G.L. c. 62C, §§ 26(d) and 28. More specifically, the appellant correctly observed that the Commissioner bears the burden of demonstrating that a taxpayer has filed a false or fraudulent return or a return filed with a willful attempt to defeat or evade the tax. See **Anthony R. & Elizabeth M. Bott v. Comm'r of Revenue**, Mass. ATB Findings of Fact and Reports 2014-1293, 1301. The appellant argued that the Commissioner failed to sustain this burden, thereby invalidating the assessment against the appellant. In support of this argument, the appellant placed particular emphasis on the notion that the Commissioner never established that the appellant's workers who had been paid in cash were employees subject to withholding requirements, positing that they may have been independent contractors from whom tax need not have been withheld. The Board was not persuaded by the appellant's argument.

As a threshold matter, the Board found that the appellant's contention regarding its workers' employment status bordered on

disingenuous. The evidence presented indicated that Mr. Vuong understood the appellant's filing and withholding obligations with respect to employees. Mr. Vuong also stated that the reason he paid certain workers in cash was because they preferred to be paid in cash. No mention was made of differing job classifications or cash payments made to independent contractors and no documentation associated with independent contractors, such as Forms 1099, was created or filed by the appellant. Moreover, with the exception of the manner in which they were paid, all of the appellant's workers were similarly situated, fulfilling the temporary needs of light-industrial businesses. Finally, it is noteworthy that throughout the proceedings relating to this appeal and during the internal appeals process at the DOR, the appellant made no effort to establish, either through testimony or submission of documentary evidence, that the individuals who were paid in cash were not employees subject to withholding requirements. In sum, the record in this appeal led inexorably to the conclusion that the workers who were paid in cash were the appellant's employees, like their co-workers who were paid by check.

In *Peter Ruggiero, Inc. v. Comm'r of Revenue*, Mass. ATB Findings of Fact and Reports 1995-162, the Board considered whether the Commissioner had properly issued an assessment under G.L. c. 62C, § 26(d). The taxpayer in *Ruggiero* sold tangible

personal property yet filed monthly sales tax returns showing no taxable sales and zero tax due. The Board found that the appellant knew that the returns were inaccurate but never sought professional assistance, filed amended returns or paid over collected taxes to the Commissioner. *Id.* at 166. Under these circumstances, the Board found that the taxpayer had filed false returns with the knowledge that they were incorrect, noting that "[n]umerous federal cases have held that a pattern of omissions or understatements of income over the years, without a tenable explanation, may warrant a finding of civil fraud." *Id.* (citing *Kramer v. Commissioner*, 389 F.2d 236 (1968)). The Board also found that the taxpayer's "reckless indifference" to tax-reporting and payment obligations "constituted an 'intent to evade' taxes" within the meaning of G.L. c. 62C, § 26(d). *Id.* at 168. Based on these findings, the Board ruled that the Commissioner had properly issued an assessment under § 26(d).

Similarly in this matter, the appellant, through the actions of Mr. Vuong, knowingly and persistently filed Withholding Tax Returns that failed to account in any way for millions of dollars of cash payments to its employees. Mr. Vuong understood the appellant's withholding and filing obligations and chose to ignore them in favor of operating an undocumented cash business, a business that was operated in violation of several wage laws. Given these facts, the Board found that the

appellant, like the taxpayer in **Ruggiero**, filed returns with the knowledge that they were incorrect, and that the filings, which spanned five years, reflected the appellant's intent to evade its tax-reporting and payment obligations. Therefore, the Board found and ruled that the Commissioner was justified in issuing an assessment pursuant to G.L. c. 62C, § 26(d). For essentially the same reasons, the Board found and ruled that the Commissioner properly imposed additions to tax under G.L. c. 62C, § 28.

Accordingly, the Board issued a decision for the appellee in this appeal.

THE APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____
Clerk of the Board